No. 3179

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SCHENK & MCDONALD, a copartnership composed of Edward Schenk and Gordon D. McDonald, and EDWARD SCHENK and GORDON MCDONALD, as individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS (a corporation),

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Statement of the Case.

This is an action originally brought by the defendant in error as plaintiff against the plaintiffs in error as the defendant on an open account extending from October, 1916, to September, 1917, the date on which the action was commenced.

A bill of particulars was filed, showing that the parties had dealt with one another prior to October, 1916, but the complaint did not demand anything from the plaintiff in error because of such dealings.

It is claimed in the complaint that the defendant in error had advanced money and merchandise to the plaintiffs in error in the sum of $17,308.00, and that the plaintiffs in error had agreed to furnish logs to the defendant in error or repay said amount in cash. That $15,407.97 had been paid, which amount included $74.42 due the plaintiffs in error in the Fall of 1916, the balance of the amount paid having been paid during the year 1917, leaving the amount due at the time of commencing suit $1,900.03.

A bill of particulars was filed, showing the various items sued for as well as the credits and also showing the items of account existing between the parties prior to October, 1916.

The defendants answered, and denied the indebtedness and filed five counter-claims. In the first counter-claim it was alleged that between the 1st of May, 1915, and September, 1916, the defendants sold and delivered a quantity of logs to the plaintiff (defendant in error) on which there was still due the sum of $697.20.

A second counter-claim set up the fact that in the Summer of 1916 the defendants furnished the plaintiff with a tow-boat, and that there was due them the sum of $860.00 on that account.

The third counter-claim set up the fact that between March, 1917 and August, 1917, the defendants sold and delivered to the plaintiff a certain quantity of logs on account of which there was still due the defendants the sum of $757.46.

The fourth counter-claim was based upon allegations to the effect that the defendants had furnished the plaintiff with certain boom chains of the value of $238.50. And a fifth counter-claim was based on the alleged fact that the defendants had furnished the plaintiff with a number of workmen, on account of which there was still due them the sum of $27.00.

The new matter in the answer as well as the matters and things set up in the counter-claims were denied. Upon the trial, and upon this appeal, there was, and is, no dispute with reference to the items charged by the defendant in error to the plaintiffs in error. The real dispute between the parties related to the credits given the plaintiffs in error by the defendant in error for logs delivered to it. Two written contracts were offered and received in evidence, one made in the Spring of 1916, and the other in the Spring of 1917.

Both of these contracts relate to the delivery of logs by the plaintiffs in error to the defendant in error. The defendant in error did not upon the trial claim anything under the first of these contracts, all the moneys advanced thereunder having been repaid by the delivery of logs prior to October 1916, there being then a balance due the plaintiffs in error of $74.42, so that the entire demand of the defendant in error is based upon the transactions had under the contract made in the Spring of 1917. It might here be added that one of the items of account sued upon was an item of $1050.00 advanced

in cash on October 12, 1916, and which was advanced to pay stumpage on logs to be cut in 1917. At that time, as stated, there was due the plaintiffs in error from the defendant in error the sum of $74.42, which indebtedness was of course paid up when the thousand and fifty dollars were paid.

In order to avoid repetition, the various contentions made by counsel for plaintiffs in error will be taken up and discussed here in the order in which they appear in his brief.

Argument.

A.

THE DELIVERIES OF 1916.

Under this heading counsel discusses the dealings had between the parties during the Summer of 1916. As has already been pointed out, it is entirely immaterial so far as the defendant in error's case was concerned, what these dealings were, because the complaint did not claim anything because of them. These dealings were had before October, 1916, and the account sued upon commences in October, 1916. The only way that the transactions had in 1916 could become material would be by proper allegations in a counter-claim. Now the first counter-claim set up by plaintiffs in error contains allegations to the effect that a sum therein named is due because of logs sold and delivered in 1916, but the claim made was based upon an alleged

agreement concerning which no evidence was introduced. There was a contract received in evidence as Exhibit A between the parties with reference to the sale and delivery of logs during the Summer of 1916, but it is not the contract upon which the first counter-claim of the plaintiffs in error is based, the claim of the plaintiffs in error being that this contract was abandoned and that the logs to be delivered under it were delivered under a subsequent oral contract.

I. *Were the 1916 deliveries made under the written contract?*

Under this head, counsel for plaintiffs in error argues that the logs delivered in the Summer of 1916 were in fact not delivered under the written contract made by the parties in the Spring of that year, but that this contract was abandoned and another and different oral contract substituted in the place thereof. The contract, Exhibit A, provides that the logs to be delivered as specified shall consist of one million feet more or less,—not of an exact one million feet, as counsel seems to indicate, are to be cut on the north end of Prince of Wales Island and placed in the waters of the sea, and that the place where they are boomed up for the tug boat to get them shall not exceed 170 miles distant from the mill at Juneau by the ordinary route of water travel.

Now the logs that were actually delivered in 1916 did not come from the north end of Prince of Wales

Island, but from other places a short distance from there, and it is argued by counsel for plaintiffs in error that this fact results in an abandonment of the contract. It must be borne in mind in this connection that the thing dealt with was saw-logs, not saw-logs that grew in this or that particular spot. The only importance that the place where the logs should be cut could have was to locate that place not too far distant from the sawmill, because the mill company was obliged to tow the logs; hence the stipulation in the contract that the place where the logs were to be delivered was not to exceed 175 miles from the mill. If logs cut at some place other than the place designated in the contract were delivered and accepted by the mill company there would surely be no abrogation of the contract. To illustrate, suppose the price of logs had gone down and logs were delivered and received by the mill company. Under those circumstances, the court would not permit the mill company in an action brought for the price to show that those logs were not delivered under the contract and should be paid for only at their reasonable worth.

On the other hand, suppose logs had gone up, the court would not permit the party delivering the logs to come in and say that those logs were not delivered under the contract and should be paid for at a higher price. The subject-matter dealt with was the saw-logs. One of the parties sold these logs and the other bought them, and so

long as the logs were delivered and accepted without a specific agreement to the contrary, the court would hold the deliveries made under the contract and the fact that the logs were not cut at the identical place referred to in the contract is an immaterial matter.

Of course the parties could, by agreement, abrogate the contract and make a new one, but courts do not presume that that sort of action was taken. The substitution of one contract for another should be by the execution of another agreement of equal dignity with the contract abrogated. In this case the original contract was in writing so that the contract substituted should also have been in writing. In any event, even if a written contract were not required for that purpose, there should be at least clear and explicit oral testimony upon the subject. In this case there was none. True, counsel for plaintiffs in error says that Mr. McDonald investigated the timber and found that the timber on Prince of Wales Island was not suitable and did not for that reason make a bid on it with the Forestry people and so advised Mr. Worthen. But surely this was not an abrogation of the contract; there was no agreement here; the plaintiffs in error simply told the defendant in error that they were not going to bid on this particular timber because it was not suitable, but no one said anything about the abrogation of the contract.

Later on, according to the brief of plaintiffs in error, the mill company's steamboat captain came

to McDonald at Portage Bay and told him that the mill was in great need of logs and begged to let him have a raft then in the water at Portage Bay.

It can be readily understood why the mill company was in great need of logs. If plaintiffs in error's theory is the correct one, the plaintiffs in error had a perfect right to make a solemn contract to furnish these logs and then by simply notifying the defendant in error that they were not going to cut them, absolve themselves from all obligation and leave the defendant in error with a sawmill without logs, and then when defendant in error begged for logs the plaintiffs in error should, according to counsel's theory, be permitted to say that those logs were not furnished under the contract, and should be permitted to take advantage of their own wrong with a view of avoiding the obligations stipulated in the contract.

There is nothing here to indicate that the captain of the steamer, or any one else, absolved the plaintiffs in error of obligation under the contract or agreed to take these logs under any other or separate agreement. The only testimony upon the subject outside of that of Mr. Worthen is that of Mr. McDonald, and after giving it a most favorable construction, it does not tend to prove a novation, the abrogation of the original contract or the substitution of a new one.

At page 74 of the record Mr. McDonald says that at the time of the execution of the contract he told Worthen that he thought the timber on the

north end of Prince of Wales Island was good. He thought he told him that he would look it over again and that after he had looked it over he told him he did not think the timber was really good and that he did not apply for a sale of it to the Forestry Department. He said he thought this talk with Worthen was sometime in April, a short time after the signing of the contract and that after that he delivered logs to Worthen. That the captain of the "Caritta", the tow-boat of the Worthen Lumber Company came to him and told him that the mill was short of logs and asked him for logs and that he furnished him a boom then at Portage Bay. The conversation narrated was the only conversation had by him at that time and that other logs were delivered on similar occasions.

Previous to this time it will be remembered, Mr. McDonald had had no conversation with Mr. Worthen, the conversation was with the captain of the steamboat, but after the delivery of the Portage Bay raft, and prior to the delivery of the other rafts made in the Summer of 1916, he had a conversation with Worthen himself, and that conversation, according to the testimony on page 76 of the record, was as follows:

> "As far as my mind goes on that, I think I had a talk with Mr. Worthen in January here, after I was here in the spring, and he asked if he could get those logs, and he also took it up with the George E. James Company who had the logs or who the logs were put in for in the first place, and they refused to let him have them, as far as I understand from

the conversation I had. The James Company afterwards told me I could dispose of them if I wanted to—that is, if I saw fit they wouldn't hold them any further—they were not able to take them at that time.

"Q. They were logs that were cut for the James Company? A. Yes.
"Q. And subsequently at the request of Mr. Worthen they released you? A. Yes.
"Q. And you turned them over to Worthen?
"A. Yes.
"Q. And what time was that?
"A. It was in June.
"Q. June, 1916?
"A. Yes, about the 24th of June when their tug-boat came into camp."

Testifying to a later conversation, the witness testified:

"Q. Did you have any further conversation with Worthen in regard to that?
"A. Well, we had a conversation here at the time, here in Juneau, that season, along about the middle of the season, in regard to logs in Duncan Canal, and he asked if he could get some logs from Duncan Canal, as near as I remember, and I told him I would give him a boom from Duncan Canal, and he got the boom in September."

Now, that is all the testimony on the subject of a new and second contract. Nowhere does any witness testify that the parties agreed to do away with the first contract, nor does any witness testify to the execution of a new one. True, the plaintiffs in error did not cut the logs they agreed to cut on Prince of Wales Island and the manager of the Worthen Mills implored them to deliver logs cut

elsewhere, but at no time was there any conversation between the parties to the effect that those logs were either to be under the contract or not to be under the contract. There was no discussion about the price of the logs; nothing was said about the manner of delivery for the obvious reason that both parties understood the logs to be delivered under the contract then existing between them.

If Mr. McDonald or any witness had testified clearly and explicitly to a subsequent agreement, there might be something to discuss, but since there is no evidence from any witness that there was such a thing as a subsequent agreement, it is idle to discuss the existence or non-existence of such an agreement. In order to prove a novation or a subsequent agreement there must be clear proof first that it was agreed that the original agreement should be abandoned; and second, that a new agreement should be substituted in the place thereof, and for this there must be a consideration. See

29 Cyc., 1130;
In re Hansford, 194 Fed. 658.

Whenever parties deal with reference to the subject-matter of a written contract existing between them, there is only one presumption that can be indulged in and that is that they deal under the contract. Here the subject-matter of the contract was saw-logs, not saw-logs cut on Prince of Wales Island, or at any other particular place, but saw-logs, and the question of where they were to be cut was important only in determining the distance

the logs were to be towed. The towing was to be done by the mill company, and if the mill company took logs from a point other than that designated in the contract without complaint, the company simply waived that provision in the contract.

Since therefore there was no novation and no new and subsequent contract, but the dealings had between the parties in the year 1916 were under the written contract, "Exhibit A", plaintiffs in error could not recover on their first counter-claim because that counter-claim was based not on a balance due under that contract, but on a balance due under another and different contract concerning which there was no evidence.

It may here be added that even if there had been no contract between the parties at all, either written or oral, there could not be a recovery on this counter-claim under the evidence for the evidence only goes to the effect that certain logs were delivered. There is no agreement as to what was to be paid for them; that is to say, outside of the original written contract, nor is there any evidence as to what these logs are reasonably worth. There could be no recovery on express contract at so much per thousand, because under the evidence the parties never referred to price; nor could there be a recovery on a *quantum meruit,* because there is no evidence as to what the logs were reasonably worth.

The court therefore was clearly correct in holding that there could be no recovery under the first counter-claim. As shall be indicated hereafter,

the court's ruling would have been nevertheless correct even had the written contract been set up in the counter-claim, but as the counter-claim was not based upon this written contract that question becomes largely academic.

The logs delivered were scaled at the mill by one Stevenson, employed by the mill company for that purpose. Mr. Stevenson, the record shows, was a professional log-scaler, of wide experience, who was employed from time to time by the mill company to do its scaling and had otherwise also been employed for short periods in connection with special work, but was not a regular employee.

At the trial the plaintiffs in error tried to introduce evidence with a view of proving that the scaling done by Stevenson was not correct; that is to say, they offered proof to the effect that the forest rangers, who had also scaled the logs, had scaled them somewhat higher than Stevenson. The court excluded this evidence with reference to logs delivered under either contract. The evidence that was offered with reference to the 1916 contract was excluded on the ground, first, that the contract itself was immaterial and that all evidence relating to the quantity of logs delivered in 1916 prior to October was immaterial; and second, on the further ground that in any event the testimony was immaterial under the provisions of the contract.

As has already been pointed out, the plaintiff did not sue to recover anything due because of dealings had prior to October, 1916, so that ne-

gotiations had between the parties prior to that date became immaterial unless made material by proper allegations in a proper counter-claim.

It has also been pointed out that the contract relied upon for a recovery in plaintiffs in error's first counter-claim for the dealings had in 1916 was not the written contract then in existence between the parties, but an alleged verbal agreement concerning which no evidence was offered. Hence testimony relating to the quantity of logs delivered during 1916 under the agreement set up in the counter-claim was immaterial, there being no evidence that there was any agreement.

Turning now to a discussion of the contract itself, we find that the ruling of the court was equally correct even though a contract had been properly before the court; that is to say, even though the plaintiff had made a demand for something due prior to October, 1916, or the defendant had set up this written contract by proper allegations in a counter-claim. It may here be added that the allegations of the counter-claim being somewhat uncertain upon the subject, their construction was made clear by the evidence offered in the case and the statements of counsel both upon the trial and before this court.

The statement of counsel as it occurs in his brief, for instance, is as follows:

> "Plaintiffs in error insist first, that no logs were delivered under the terms of Exhibit A; that this contract was abandoned and that the

> logs were delivered pursuant to an oral contract entered into subsequent to the execution of Exhibit A."

Then we come to the head "second": "the contract of 1916 does not bind the loggers to accept the mill scale".

This is the proposition as stated by counsel for plaintiffs in error under subdivision 2, the contention of defendant in error being that the contract of 1916 is such under the circumstances of the case that the plaintiffs in error were bound by the mill scale.

When the contract of 1916 is considered as a whole, it will not only be seen that the contract is entirely reasonable, but that all the various provisions can be readily harmonized so that effect can be given to each and all of them.

With reference to this matter of scaling, the contract provides as follows:

> "The said logs shall be scaled by the Scribner log rule and the said first party agrees to accept the mill scale."
>
> "Each boom of logs shall be scaled by the party of the first part, and this scale shall be sent to party of the second part for the purpose of comparison with number of pieces in boom."
>
> "And it is further agreed that in case of dispute over scale, the scale of a competent disinterested person shall be accepted as final by both parties."

In the construction of this contract, it must be borne in mind that these logs were to be cut within the Forest Reserve where they would be scaled

by forest rangers. It could, of course have been provided that the scale of the forest rangers should have been accepted by the parties, but while it is necessary for persons taking timber from the public domain to pay stumpage in accordance with this scale, few practical mill men would wish to pay for logs upon a basis of the scale made by these young men. They may be fair enough and do the best they can, but the fact remains that they are scaling the logs with a view to collecting stumpage for their principal. In the purchase of logs from the Government Forestry Department, the purchaser cannot dispute the scale of the forest rangers; he must accept that scale and pay stumpage accordingly, or leave the logs, and if he has once invested his time and labor in cutting the logs, he is of course in no position to leave them. But while that is true as far as the payment of stumpage is concerned, a sawmill operator purchasing the logs has a right to exercise the option of scaling them himself before he purchases the logs from the party who has purchased them from the government. When the logs are so scaled by the mill operator, that of course is the mill scale as distinguished from the forest rangers' scale. When logs are purchased at the mill scale, the mill operator can fix a price accordingly. In this case, the price fixed was $6.00 per thousand mill scale. Had the logs been purchased at the forest rangers' scale, a different price would undoubtedly have been agreed upon.

Now the contract provides that the loggers shall accept the mill scale. There is nothing unreasonable about this, nor is there anything unusual about it. It simply binds them to the mill scale as distinguished from the forest rangers' scale. And this contract provides that the Scribner rule shall govern in scaling the logs, so that it provides just what the mill scale consists of, the idea being to so scale the logs that the loggers would be paid $6.00 per thousand for the lumber actually contained in the logs, regardless of what stumpage was paid.

It is next provided that the loggers, the parties of the first part, should scale the logs themselves and supply the mill with a copy of their scale showing the number of pieces for the purpose of comparison.

The loggers in this case have not shown that this provision of the contract was complied with by them.

The next provision is that in case of dispute, a disinterested third party should be called in to scale the logs and his decision shall be final.

Clearly it was the intention of the parties that the parties of the first part, that is to say the loggers, should send in their scale with the logs in order that it might be compared with the scale made at the mill, and if there was any dispute between these two scales a third party was to be called in to settle the controversy.

But, as has already been stated, there is no evidence that the loggers ever scaled the logs or sent in a scale in order that their scale might be compared with the mill scale. And in any event, there is no evidence that there was any dispute about this scale until the time of the trial.

Now, if the loggers were not satisfied with the scale made by the mill company, certainly they should have disputed the correctness of that scale within a reasonable time, disputed it before the logs were sawn up in order that the third party might re-scale the logs. To say that they can wait for nearly two years, as counsel contends for, after the logs have been sawed into lumber and the lumber sold, and then dispute the correctness of the mill scale by saying that the scale of the forest rangers was something different, results not only in doing away with the provisions of the written contract, but in bringing about the very conditions that those provisions were evidently designed to guard against; that is to say, the adoption of the forest rangers' scale, for the logs having been sawed into lumber, neither party is in any position to prove the correctness of this or that scale, or to offer any evidence touching the question of how many feet were contained in the logs except the evidence on one side of the mill scale and the evidence on the other side of the forest rangers.

Clearly the contract itself does not contemplate any such state of affairs, because it provides that in case of dispute the logs shall be re-scaled by a

third party; hence, under the terms of the contract the parties intended to provide that the dispute must arise while the logs were still in existence so that they could be re-scaled.

Counsel for plaintiffs in error contends that evidence of what the forest rangers' scale consisted of was admissible in the first place to prove that the credit allowed by the Worthen Company for logs delivered in 1916 was not correctly allowed. But counsel forgets in the first place that this is an action on an open account only for items occurring since October, 1916. All these logs were delivered before that time so that if the credits prior to that time were not correctly allowed, they could be brought to the attention of the court only by a counter-claim, and counsel, as we have shown, has placed upon the contract itself a construction entirely erroneous because the scale by which the logs were to be measured is the mill scale and not the forest rangers' scale under the express provisions of the contract and, since the correctness of the scale made by the mill was not disputed until two years after the logs were sawn into lumber (whereas the contract provides that the dispute shall be settled by a re-scaling of the logs by a disinterested party, evidencing the intention of the parties that a dispute to be entertained must be made while the logs are still in existence, which is not only in accord with the express language of the contract, but in accord with reason and common sense), the court very properly refused to permit the witnesses to

testify at this time as to what the scale of the forest rangers was.

Counsel, however, contends that this evidence was competent under the first counter-claim. He says:

> "There was no need for the loggers proving the price agreed on because that price had been adopted in the bill of particulars and was not disputed and had been testified to by Mr. Worthen. Why prove what was conceded throughout the trial."

Counsel seems to forget that the point with reference to his first counter-claim is that he must first prove a contract between the parties such as he alleges in the counter-claim. Mr. Worthen admits that the price to be paid for the logs was $6.00, but his conception of the transaction was that the logs were delivered under the written contract which provided for the payment of $6.00. Throughout the trial it was agreed that $6.00 was the price under the written contract, but neither Mr. Worthen nor any one else agreed that $6.00, or any other sum, was to be paid under a subsequent oral contract. Mr. McDonald did not so testify, nor did any one else at the trial testify that the price was to be $6.00, or any other sum, nor did any one testify to any agreement at all for the sale of logs at $6.00 or any other price except the agreement that was in writing. There is the difficulty with counsel's position. He set up a verbal contract in his counter-claim and then failed to prove it, or to offer any evidence of such contract and, as before stated, had there been no written contract at all, the proof

would not have been sufficient even to permit counsel to recover on a *quantum meruit,* because in that case he would have been compelled to prove the reasonable value of the logs. Even this was not done.

In view of what has been said, it is not necessary to follow counsel in the discussion of propositions relating to the construction of contracts for it is not a question of whether the printed or typewritten portions of the contract shall prevail, because they are in perfect harmony, so there is no occasion to hold that either one or the other shall prevail over the other, nor is there any question as to how this or that ambiguity shall be considered, for we have shown that there are in this contract no ambiguities.

The parties simply provided that the mill scale should prevail, a provision that was evidently inserted with the view of giving the mill a chance to scale the logs so that it would pay only for the lumber contained therein regardless of what the logs were scaled at by the forest rangers who were interested in collecting as much stumpage as possible.

The contract further provided that the loggers should scale the logs themselves and send the result of this scale together with the number of pieces to the mill for purpose of comparison.

Now, it must be borne in mind that this provision does not provide that the loggers shall cause the logs to be scaled by the forest rangers. No

provision in the contract was necessary to bring that about for the forest rangers would scale the logs in any event. But it was provided that they must scale the logs themselves and send the scale indicating the number of pieces to the mill for purpose of comparison.

Then it is provided later in the contract that in case of dispute over the scale the logs should be re-scaled by a disinterested third person and that his decision should be accepted as final by both parties.

The reason for this provision is also obvious. Both parties were interested in having disputes with reference to scale settled as early as possible, so that the logs might be sawed up with safety, and one party get his money for the logs and the other his money for the lumber. There having been no dispute with reference to the scale and two years having elapsed since the logs were cut into lumber so that no one can either prove or disprove the correctness of this or that scale, the court very properly held that the mill scale prevailed independent of any of the other propositions heretofore alluded to. Viewed, therefore, from any point, the ruling of the court was correct.

B.

THE CONTRACT OF 1917.

As stated by counsel in his brief, it is conceded that all the logs delivered in 1917 were delivered

under the contract Exhibit D, and the only question in dispute with reference to this whole matter is whether the parties furnishing the logs are bound by the mill scale or had a right to call witnesses to show what the logs scaled according to the scale made by the forest rangers.

Like the contract of the previous year, this contract expressly provided that the parties furnishing the logs were to accept the mill scale. The provisions with reference to the scale in this contract are as follows:

> 1st. "The said logs shall be scaled by the Scribner log rule, and the said first party agrees to accept the mill scale.
>
> "And it is further agreed that in case of dispute over scale the scale of a competent disinterested person shall be accepted as final by both parties. All logs shall be paid for in full within thirty days from date of delivery. 34 ft. logs shall be scaled as 32 ft. long."

The price of the logs was fixed at $6.50 per thousand. Clearly in fixing the price of the logs in this case as in the case of the preceding year, the price was based upon the mill scale and not upon the forest rangers' scale, for the contract provides that the parties furnishing the logs shall accept the mill scale and that the scale when made at the mill shall be made by the Scribner log rule.

If, for any reason, the parties furnishing the logs are not satisfied with the scale made at the mill, the contract provides that they shall have the right to have the logs re-scaled by a third party who

shall be disinterested and competent and whose scale shall be final and accepted as such by both parties.

Clearly the parties intended that if a dispute with reference to the correctness of the mill scale should arise it should be before the logs were cut into lumber, for the dispute under the contract was to be settled by a re-scale of the logs by a disinterested third party whose decision was to be accepted by both parties as final, for the obvious reason that it was desired by both parties that matters should be left in such shape that the mill could proceed to cut the logs into lumber and, as pointed out by the trial court, it is expressly provided that the logs should be paid for within thirty days, and clearly it was not the intention of the parties that the logs should be paid for and a dispute settled afterwards.

In this case the logs were paid for long before the thirty days; in fact, they were paid for in advance, not only paid for but over-paid for, and that is what gave rise to this controversy, but the intention of the parties themselves is clearly manifest by the provisions of the contract.

The contract not only fixes, as has been pointed out, the time of payment, which could not very well be made until all disputes with reference to the quantity of logs delivered had been settled, but also provides that disputes shall be settled by a re-scaling of the logs which cannot be done after the logs have been sawed into lumber and ceased to exist.

Under this state of facts the court held that the parties furnishing the logs are bound by the mill scale and could not now dispute it by an attempt to prove what the forest rangers scaled the logs at. How the court could have held anything else is difficult to conceive. If parties furnishing logs could make this kind of a contract and then come in when they were sued to recover for provisions furnished them for which they had not delivered logs, and dispute the correctness of the mill scale after the logs had been sawed into lumber, they could not only lay back with the forest rangers' scale, but could bring in any number of witnesses who might testify they had scaled the logs and found them to contain thus and so many feet, and none of this evidence could be rebutted by the sawmill company, for it had only scaled the logs once and the logs were no more because they had been cut into lumber. Any such ruling would do away with the safety provided by written contracts and open the door for fraud and chicanery.

That the ruling of the court resulted in doing substantial justice is evidenced from the fact that these logs when sawed into lumber did not make as much lumber as the loggers were paid for by the mill company; that is to say, the mill scale was somewhat higher than the actual lumber contents of the logs. (See evidence Worthen, record, page 64.) This being the case, the mill company at least did not get any the better of it. But even if it did, the contract is explicit in its terms so that the

parties would be bound by the mill scale unless the correctness of that scale were disputed in the manner indicated in the contract itself.

Counsel, in discussing the court's decision, treats it as though the court held that the parties were given under the contract just thirty days within which to start a dispute on the scale. The court did not hold this. What the court did hold was that in view of the fact that payment was required in thirty days it was reasonable to presume that the parties did not expect that a dispute should be started after payment was made; so that thirty days was at least a reasonable time to allow the parties to dispute the scale. It occurs to us that the court placed a construction on that portion of the contract most liberal to the loggers, for the contract also provides that in case of dispute over the scale a disinterested third party shall re-scale the logs and both parties shall accept the result of such scale as correct.

This part of the contract clearly provides for the manner in which disputes about the scale shall be settled, and also clearly indicates the time during which such disputes shall arise and that time is limited to the time when the logs at least in the ordinary course of business would still be in existence.

No mill owners buy logs and keep them in the boom for a great length of time, for two reasons: in the first place, it would mean an unnecessary investment of capital, and in the second place logs

deteriorate very rapidly if kept in the water for a long period of time without cutting them into lumber.

All these facts were known to the parties when the contract was made, and knowing these facts they provided for a scale of the logs themselves in case of dispute.

Under the contract therefore, it is incumbent upon the party questioning the mill scale to dispute its correctness while the logs were still in exsitence so that a re-scale could be made and, as was well stated by the court, it surely cannot be presumed that it was the intention that the logs should be paid for and that thereafter the disputes concerning the scale should be settled between the parties. There is nothing inconsistent in the provisions of the contract. It is provided that the mill scale shall govern and where disputes arise a disinterested party re-scales the logs, but when the logs are so re-scaled, the scale is nevertheless the mill scale as distinguished from the scale by the forest rangers and it is this scale at the mill, whether made by the party employed by the mill or by a third party in the case of dispute, that governs. Since there was no dispute in this case, the court correctly held that the scale by the party employed by the mill for that purpose must be accepted by the parties under the contract. And this is in entire harmony with the construction placed upon the contract by the parties themselves.

The mill company scaled the logs upon arrival and credited the logging concerns with the logs supplied. It did not fortify itself with a great deal of evidence touching the contents of each boom, as it would have done had it had in view coming law-suits or coming disputes concerning the contents of the book. The logs were simply scaled and when needed they were cut up, and that they were fairly scaled is evidenced from the fact that when cut up they did not produce as much lumber as the loggers were given credit for.

Worthen agreed to pay the stumpage charges; that is to say, to advance the money to the loggers to pay the stumpage charges, and of course in order to make such payments was obliged to get the forest rangers' scale to determine the number of feet charged. But knowing that this was supposed to be in excess of the actual number of feet in the log according to mill scale, that is to say, the scale designed to determine not how much stumpage is to be charged but how much lumber the logs would produce, paid no further attention to the matter but cut up the logs, and McDonald never said a word about any dispute until this litigation arose months after the logs had been cut into lumber.

Nor is there anything unreasonable or harsh in enforcing the contract that provides the parties shall accept the scale at the mill, for clearly when the parties made the contract they had in their mind the distinction between the scale of the forest service and the scale at the mill in determining

and fixing prices, and it would not only be harsh but unreasonable to compel the mill company to pay the price based upon the mill scale and accept the scale of the forest rangers in determining the number of feet.

Under this contract the mill company was not to be the judge of its own case; it was simply provided that it should scale the logs and if the other parties were not satisfied with this scale they could call in a disinterested third party to make a new scale, and both parties agreed to accept the scale made by the disinterested third party. Nothing could be fairer, and nothing could be more practical.

Counsel devotes a great deal of space in his brief to the meaning of the term "mill scale". What that term means is very obvious from this contract. It was a scale made at the mill in accordance with the Scribner log rule as distinguished from a scale made by the forest rangers. This is perfectly clear, but counsel was given every opportunity by the court to prove what the term meant when employed in contracts such as this, and if it had any other meaning favorable to counsel's position, he was certainly given every opportunity to show this.

The statement of counsel in his brief that the court ruled that plaintiffs in error were not entitled to show by oral evidence the meaning of the term "mill scale" is erroneous. Counsel called a witness to prove what the term means when used in the literature of the Forest Department. The court held that this was immaterial, but at the same time

told counsel that he might call witnesses to show what the meaning of the term was when employed in contracts between loggers and mill men or when used by parties engaged in the business that these parties were engaged in.

Counsel first called as a witness Mr. McDonald, and asked him what the conversation was between him and Mr. Worthen as to the interpretation to be placed on the term "mill scale". The court sustained an objection to that question on the ground that it was not a question of what was said by the parties but the meaning of the term when employed in contracts such as the one before the court. The language of the court, which occurs on page 85, is as follows:

> "The COURT. Objection sustained. That is not the question. The question is what is a mill scale. He uses the terms of an industry that has its own phraseology, supposed to be known to the persons that are using it, but perhaps unknown to the jury. Now, he may be asked what is meant when the term 'mill scale' is used between loggers and mill men, because the jury do not necessarily know what that means, but I think any representations made by Worthen to him as to what he understands by it, or by him to Worthen as to what he understands by it are all merged in the contract. Otherwise there would be no safety in making a contract."

Later on, the witness Weigle was asked to give a definition of the term "mill scale" as accepted by the Forestry Department. The court sustained an

objection to this question, employing the following language, as it occurs on page 104 of the record:

> "The COURT. The objection is sustained, unless this witness knows what it means in the usual acceptation of the term between millmen and loggers. Within those limits I will allow testimony, but I cannot allow testimony as to what it means in relation to a matter that is not before the court."

Counsel further contends that the evidence of what the forestry scale was should have been admitted since it would show gross errors or fraud in the Stevenson or mill scale.

The difficulty with this whole contention is that even if all that counsel claimed were true, the scale by the government forest rangers would not show anything of the kind. Everyone would expect the forest rangers' scale to be higher than the mill scale. The former is made with the view of how much stumpage the Forestry Department shall get and is made by the parties collecting the stumpage. The second is made with a view of determining how much lumber can be actually cut from the logs. But laying all this aside, if there is a difference between the two scales, the fact that such a difference exists might with equal propriety prove gross error on the part of the forest rangers, and if it was the purpose of counsel to prove either error or fraud in the mill scale made by Stevenson, he should have set up these facts in his pleadings. These are matters that must first be plead before they can admit of proof. He did not even ask to amend his plead-

ings so as to admit proof of fraud or mistake. But the whole difficulty with the situation is that the contract clearly did not contemplate the acceptance of the scale by the forest agents, but the scale at the mill. And further, that under the terms of the contract it was clearly not the intention of the parties that this mill scale should be disputed months after the logs were cut into lumber so that no proof touching the correctness of the mill scale could be offered by the mill company. And, with this in view, the court sustained the objection.

The statement of counsel that his proof might be altered to show that the rafts scaled by Stevenson were not the rafts delivered at all is not borne out by the record. There is no dispute between the parties as to the identity of these rafts. Worthen testifies that the rafts delivered by Schenk and McDonald were the rafts scaled by Stevenson. McDonald testifies to the delivery of these rafts. Stevenson testifies that these rafts came from McDonald and Schenk, and referred to them as rafts coming from this or that particular point. Of course these witnesses were not on the tow-boat to observe every movement touching these logs from the time the tow-boat hooked on to them until they were scaled, but they had all the knowledge concerning that subject that any one connected with a business of that character could have.

The court told counsel upon the trial that if he could in any manner prove that the rafts scaled were not the rafts delivered, he might do so, but

refused to admit proof of what the forest rangers' scale was when offered simply to show that there was a discrepancy between the scale of the forest rangers and the mill scale, there being no dispute between the parties as to the identity of the rafts.

The mere fact that one party scaled the raft and found it contained more lumber than the other would not prove that the rafts scaled were not the same rafts. It would simply prove there was a difference between the result of the work of scaling as conducted by the two men.

Clearly the case was fairly tried and the contract fairly considered and substantial justice was done between the parties. The court under the contract held the loggers to the mill scale, but the evidence shows that when the logs were actually cut into lumber they did not produce as much lumber as the mill scale called for. So that the loggers were paid more money than they would have been entitled to had they been paid for the actual lumber in the logs. This being true, the result of the case is eminently fair as far as all parties are concerned.

Plaintiffs in error complain of the assessment of costs, not because this or that item of the costs were not actually incurred or were not a proper subject of taxation, but because in the judgment of counsel the procedure had was not the correct one. An examination of the record will disclose the fact that counsel has merely taken an erroneous view of the procedure required by the statute.

Section 1348 of the Compiled Laws of Alaska, provided as follows:

> "Sec. 1348. Costs and disbursements shall be taxed and allowed by the clerk. No disbursements shall be allowed any party unless he shall file with the clerk within five days from the entry of judgment a statement of the same, which statement must be verified except as to fees of officers. A statement of disbursements may be filed with the clerk at any time after five days, but in such case a copy thereof must be served upon the adverse party. A disbursement which a party is entitled to recover must be taxed, whether the same has been paid or not by such party. The statement of disbursements thus filed, and costs, shall be allowed of course unless the adverse party, within two days from the time allowed to file the same, shall file his objections thereto, stating the particulars of such objections."

Now what transpired in this case was this: on the same day that the judgment was entered a cost bill was filed. This cost bill contained the item of $1066.17 as marshal's fees and this cost bill was duly sworn to. That is to say, all the items, including this item, were sworn to as being correct, and as having been necessarily incurred in the prosecution of the case. (See record, pages 138, 139.)

Under the section of the statute quoted it was not necessary that this item of marshal's fees should have been sworn to. The proof of its correctness would be presumed from the records, but there is nothing in this section which precludes the making of the proof of correctness of marshal's

fees or any other officer's fees by the ordinary oath, and oath of the correctness of this item along with all the others, was duly made.

Thereafter counsel for the plaintiffs in error filed an objection with the clerk against the allowance of this item and on the 2nd day of April, the marshal filed a certificate in the clerk's office certifying that these costs had been actually and necessarily incurred, and thereupon the clerk allowed the cost bill. This certificate so filed by the marshal was no part of the cost bill and its filing was not an amendment to the cost bill, as counsel suggests. In filing the certificate, the marshal's office merely lodged with the clerk additional evidence of the amount of its expenditures and the clerk having allowed the cost bill as filed, the matter came up before the judge on appeal. The judge thereupon directed the marshal to file an itemized statement. This itemized statement of the costs was served on counsel for plaintiffs in error before the matter came up for hearing before the court; and when the matter came up before the court counsel on both sides were present and no objection was made to a single item contained in the cost bill or in the itemized statement of the marshal. This being true, the court allowed the cost bill as filed and made the following order, which shows the proceedings had, and which appears on page 141 of the record:

"Order Affirming Taxation of Costs by Clerk.

"This matter coming on to be heard upon an appeal on the part of the defendants from an order of the clerk taxing the costs that had accrued up to the date of the judgment at $1,066.17, and the plaintiff having filed and presented to the court an itemized statement, duly certified to by the United States Marshal, of the amount of all the costs of the U. S. Marshal so taxed, which said statement had been previously served on counsel for the defendant, and both parties being present by counsel and no objection being made to any of the items contained in said itemized statement, the court finds that said costs were properly taxed and affirms the order of the clerk, and orders that the costs herein up to the date of the judgment be and the same are taxed in the manner previously taxed by the clerk, that is to say, in the amount of $1,128.17.

"Done in open court this 3rd day of April, 1918.

"Robert W. Jennings,
Judge."

There was no reason why the court could not affirm the clerk's order without asking the marshal to produce this itemized statement; the cost bill had been sworn to and there had been no affidavit or other evidence presented tending to show that the sworn statement of the cost bill that this amount had been disbursed and that its disbursement was necessary in connection with the prosecution of the suit, was not correct. The order of the court to produce this itemized statement was evidently made out of an abundance of precaution on the part of the court to avoid mistakes and to be

fair to the parties, and when this statement was presented and no objection was made to a single item in it, the court could follow but one course and this was to tax the costs as stated in the cost bill; as already stated, the court did not order an amendment of the cost bill, but merely ordered the production of further evidence touching the correctness of the cost bill when the marshal's certificate in itemized form was required.

The costs in this case were exceptionally high, but there was no way to avoid them, since the Alaska statute requires the marshal in attaching personal property to take it into his possession, and this makes it necessary to place a keeper in charge of property of the character here involved.

The plaintiffs in error might have given a bond or taken some such step as that to have the attachment released, and in that manner might have avoided these costs, but no such step was taken by them, so that it became necessary to attach and hold the logs with the result that the costs as taxed by the court were actually and necessarily incurred.

In taxing the costs, the court not only acted justly, but took every possible precaution, as we have already shown, to deal fairly with all the parties concerned.

It may be said that throughout the entire trial, the court acted with the same degree of fairness, and that his rulings, as we have indicated, were not only in accord with sound reason, but also in

strict accord with the law as applied to the facts before the court, so that the judgment should be affirmed.

Respectfully submitted,

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